



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[EPA-HQ-OAR-2014-0464; FRL-10024-28-OAR]

#### **Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide (SO<sub>2</sub>) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Environmental Protection Agency (EPA) is withdrawing its August 22, 2019, proposed rule, which proposed both to determine that the EPA made an error in the area designations for the 2010 Sulfur Dioxide (SO<sub>2</sub>) Primary National Ambient Air Quality Standard (NAAQS) for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas, and to correct the proposed error by modifying the designations of those areas to unclassifiable. The EPA is withdrawing the proposed rule because the EPA, informed in part by technical information received during the public comment period on the proposed rule that further supports the EPA's initial designations of these areas, no longer believes the bases identified in the proposed error correction support the proposed conclusion that an error correction is appropriate.

**DATES:** As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the proposed rule published at 84 FR 43757 on August 22, 2019, is withdrawn.

**FOR FURTHER INFORMATION CONTACT:** Corey Mocka, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, 109 T.W. Alexander Drive, Mail Code C539-04, Research Triangle Park, N.C. 27711; phone number: (919) 541-5142; email address: [mocka.corey@epa.gov](mailto:mocka.corey@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On December 13, 2016, the EPA designated portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas as nonattainment for the 2010 1-hour primary SO<sub>2</sub> NAAQS (81 FR 89870, codified at 40 CFR 81.344) (“Round 2 Supplement”). On February 13, 2017, Vistra Energy, which owns SO<sub>2</sub> emissions sources in each of the three areas, sent the EPA a petition for reconsideration, purportedly pursuant to Clean Air Act (CAA) section 307(d)(7)(B) and the Administrative Procedure Act 5 U.S.C. 553(e), and for administrative stay of the EPA’s nonattainment designations for portions of Freestone and Anderson Counties (“Big Brown Steam Electric Station area”), Rusk and Panola Counties (“Martin Lake Electrical Station area”), and Titus County (“Monticello Steam Electric Station area”). On March 15, 2017, the Texas Commission on Environmental Quality (TCEQ) also submitted a request for an administrative stay of the Round 2 Supplement final designations for these areas in Texas.<sup>1</sup> On September 21, 2017, the EPA initially responded to Vistra Energy’s February 2017 petition for reconsideration by indicating an intent to undertake an administrative action with notice and comment to revisit the nonattainment designations for the three areas, but explained that pending completion of such action, the nonattainment designations remained in effect.<sup>2,3</sup>

The EPA published a proposed rule in the **Federal Register** on August 22, 2019, titled “Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide (SO<sub>2</sub>) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas” (84 FR 43757) (“Proposed Error Correction”). Under the EPA’s CAA authority at section 110(k)(6) to correct errors in acting on state

---

<sup>1</sup> Additionally, TCEQ submitted a petition for reconsideration on December 11, 2017, and on December 19, 2017, Vistra Energy provided additional information regarding facility retirements and the deployment of additional SO<sub>2</sub> monitors to support its February 2017 petition for reconsideration and administrative stay.

<sup>2</sup> [https://www.epa.gov/sites/production/files/2018-09/documents/3143\\_signed\\_response.pdf](https://www.epa.gov/sites/production/files/2018-09/documents/3143_signed_response.pdf).

<sup>3</sup> The EPA recently found that Texas has failed to submit State Implementation Plans to satisfy certain nonattainment planning requirements of the CAA for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County. *See* 85 FR 48111.

implementation plans (SIPs) or in issuing designations, redesignations, classifications or reclassifications, the EPA proposed that in designating these areas as nonattainment under CAA sections 107(d)(1)(A)(i), (d)(1)(B)(ii), and (d)(2)(A), it erred in not giving greater weight to Texas's preference to characterize air quality through monitoring, and to steps undertaken by Texas to begin monitoring in these three areas, when considering all available information; in relying on available air quality analyses in making the initial designations that the EPA recognized included certain limitations; or a combination of these two issues. Therefore, to correct these proposed errors, the EPA also proposed that the previously designated nonattainment areas in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas each be revised to reflect an unclassifiable designation under CAA section 107(d)(1)(A)(iii). The EPA has not finalized the Proposed Error Correction and is not doing so in this action. Instead, the EPA is now withdrawing the Proposed Error Correction.<sup>4</sup>

## **II. Reasons for Withdrawing the Proposed Error Correction**

### *A. Additional Air Quality Modeling*

In the Proposed Error Correction, the EPA proposed that it erred in relying on available air quality modeling submitted by Sierra Club in making the initial nonattainment designations for these three areas. The EPA explained in the proposed action that the modeling submitted by Sierra Club ("December 2015" and "March 2016" modeling), which purported to show nonattainment, was developed in accordance with the general recommendations on modeling provided by the EPA but stated that the modeling contained "key limitations and uncertainties." We made this statement in the Proposed Error Correction despite also acknowledging that we had explained in the record for the Round 2 Supplement that individually these key limitations and uncertainties would not significantly change modeled results or, in many cases, could result

---

<sup>4</sup> Additionally, as detailed in a separate document published elsewhere in this issue of the Federal Register that has been signed concurrently along with this withdrawal notice, the EPA is also now denying the administrative petitions from Vistra Energy and TCEQ. *See* <https://www.regulations.gov> under Docket ID No. EPA-HQ-OAR-2014-0464.

in underestimation of SO<sub>2</sub> concentrations. In the Proposed Error Correction, the EPA also stated that given the possible collective significance of these issues and, in the case of the areas around the Martin Lake and Monticello facilities, given that the maximum modeled concentrations are within about 10 percent of the 2010 SO<sub>2</sub> NAAQS, we were less confident in our prior statements that potential adjustments to the Sierra Club modeling would not result in modeled values near or below the NAAQS.<sup>5</sup> Additionally, the EPA stated in the Proposed Error Correction that while individually these deficiencies are not dispositive, collectively they are a sufficient basis for the EPA to propose that we erred in relying on the Sierra Club modeling in making the initial nonattainment designations for the three Texas areas.

The EPA received several comments on the Proposed Error Correction. Sierra Club submitted a comment on the Proposed Error Correction that included updated modeling (“September 2019 modeling”). Sierra Club’s updated September 2019 modeling addressed all aspects of the March 2016 modeling that the EPA had identified in the Proposed Error Correction as a limitation or uncertainty. The September 2019 modeling purported to demonstrate that the Martin Lake Electrical Station area did not meet the 2010 SO<sub>2</sub> NAAQS at the time of designation in the Round 2 Supplement (*i.e.*, December 2016), and also currently does not meet the 2010 SO<sub>2</sub> NAAQS based on more recent data. Sierra Club did not submit updated modeling for the Big Brown and Monticello areas as part of its September 2019 comment submission, but rather asserted that the EPA’s previously identified limitations (individually or collectively) have no material effect on the model results for those areas in the same way as they demonstrated with the Martin Lake area’s modeling.

The EPA also notes, upon re-review of the Proposed Error Correction and Round 2 Supplement, that we did not acknowledge in the Proposed Error Correction that we actually considered the collective impact of all these same aspects of the modeling in the record for the

---

<sup>5</sup> As explained in the EPA’s final designations Technical Support Document (TSD), the modeled 99<sup>th</sup> percentile daily maximum 1-hour SO<sub>2</sub> concentrations for the Martin Lake and Monticello facilities are 14 percent and 8 percent above the 2010 SO<sub>2</sub> NAAQS, respectively.

Round 2 Supplement (to the extent those aspects remained in the March 2016 modeling relied on in the Round 2 Supplement).<sup>6</sup> In the Proposed Error Correction, we also did not explain any change in our thinking from our assessment of the collective impact in the Round 2 Supplement's record.

As explained further in the technical support document for this withdrawal, the EPA has assessed Sierra Club's September 2019 modeling submitted during the Proposed Error Correction public comment period.<sup>7</sup> This assessment supports the EPA's previous reliance on the March 2016 modeling as the basis for its final nonattainment designation for the Martin Lake area in the Round 2 Supplement. Based on consideration of that information submitted by commenters and on further consideration of the entirety of our record for the Round 2 Supplement, the EPA now has concerns with the accuracy of the Proposed Error Correction's characterization of the March 2016 modeling and no longer believes that this proposed basis supports the proposed conclusion that an error correction is appropriate or that reliance on such information for the nonattainment designation was in error. The refined modeling submitted on the Proposed Error Correction demonstrates that the EPA's Round 2 Supplement assessment of the impact of further refining the March 2016 modeling was reasonable and correct, that such refinement would not alter the conclusion that the Martin Lake area was not attaining the NAAQS at the time of the Round 2 Supplement. Overall, the EPA's assessment of the information and of our record for the Round 2 Supplement for all three areas is that refinement of the aspects of the modeling the EPA identified in the Proposed Error Correction would not alter the EPA's nonattainment designations for any of the three nonattainment area designations in the Round 2 Supplement, and that the submitted information further confirms our Round 2 Supplement analysis of then-available data.

---

<sup>6</sup> See pages 27-29, 48-50, and 75-77 of the EPA's final designations TSD, available in the public docket and at [https://www.epa.gov/sites/production/files/2016-11/documents/texas\\_4\\_deferred\\_luminant\\_tsd\\_final\\_docket.pdf](https://www.epa.gov/sites/production/files/2016-11/documents/texas_4_deferred_luminant_tsd_final_docket.pdf).

<sup>7</sup> See <https://www.regulations.gov> under Docket ID No. EPA-HQ-OAR-2014-0464.

## *B. Comments on Texas's Monitoring Preference*

In the Proposed Error Correction, the EPA also proposed that when we considered all available information at the time of designation, we erred in failing to give “greater” weight to the State of Texas’ preference to use ambient air monitors to characterize SO<sub>2</sub> air quality in their state for purposes of the designation. We proposed this despite also acknowledging in the proposal that because these areas (around certain SO<sub>2</sub> emissions sources) were subject to the Round 2 deadline of July 2, 2016, these areas were required to be designated at that time based on the EPA’s assessment of available information even though the State of Texas stated a preference to later characterize the areas based on future monitoring data and its intention to install monitors for these areas.

In addition to the modeling submitted during the public comment period for the Proposed Error Correction, the Sierra Club also commented that the EPA was required to designate the three areas in Texas by the court-ordered deadline based on the information available at that time (*i.e.*, Sierra Club’s December 2015 and March 2016 modeling). Because monitoring information was not available in 2016 for the Martin Lake, Big Brown, or Monticello areas, the Sierra Club stated that monitoring data consequently could not inform the EPA’s designations decisions. The Environmental Protection Network (EPN) submitted a similar comment claiming that the EPA did not have the discretion to delay designations for these three areas in Texas under the applicable court-ordered deadline and that the EPA was required to designate the areas based on the best available data at the time of the designations. Additionally, EPN asserted that Texas’s preference for future air quality monitoring did not undermine the available modeling data demonstrating that the areas were violating the 2010 SO<sub>2</sub> NAAQS.

In light of the comments submitted on the Proposed Error Correction, and the absence of a clearly identified error in the Round 2 Supplement, the EPA no longer believes that this proposed basis supports the proposed conclusion that an error correction is appropriate and no

longer believes that we failed to give the appropriate weight to the State's preference for future monitoring information when we considered all available information at the time of the Round 2 Supplement. For the reasons discussed below, the EPA has concerns with the prior proposed assertion that the EPA was in error for not giving greater weight to the state's preference for *future* monitoring information in the absence of any available monitoring data at that time, let alone over reliance on *then-available* air quality modeling to assess SO<sub>2</sub> air quality. Given that the Proposed Error Correction's basis was predicated on the EPA relying on or weighing more heavily a preference for information that was not available at the time the EPA was required to finalize the Round 2 Supplement, the EPA no longer believes such a basis provides substantial support for the argument that the Round 2 Supplement should be revised.

CAA section 107(d) specifies that the EPA make designations based on the air quality at the time of final designations (*i.e.*, determining at the time of signature whether the area meets the NAAQS) and consider all available information on air quality at that time. In other words, the EPA does not interpret the statute as allowing the EPA to consider future air quality in the initial designations process, and the D.C. Circuit has upheld this interpretation as reasonable.<sup>8</sup> The record for the Round 2 Supplement explains, and the EPA maintains, that both air quality modeling and ambient monitoring are appropriate tools for characterizing ambient air quality for purposes of informing decisions to implement the SO<sub>2</sub> NAAQS, including designation determinations.<sup>9</sup> The EPA's reliance on modeling to assess SO<sub>2</sub> air quality, even in the face of

---

<sup>8</sup> See *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 156 (D.C. Cir. 2015); *Catawba County v. EPA*, 571 F.3d 20, 43-44 (D.C. Cir. 2009). The 2015 decision upheld the EPA's designations issued just days before new certified air quality data became available showing more areas violating the 2008 ozone NAAQS than the EPA designated as nonattainment. See also *State of Texas v. EPA*, 983 F.3d 826, 837-838 (5th Cir. 2020) (holding that the EPA's nonattainment designation, which modified the state's recommendation, was not arbitrary and capricious because the county was not compliant with the ozone NAAQS when the EPA promulgated its designation and the CAA uses concrete terms such that a county either does or does not meet the NAAQS).

<sup>9</sup> Round 2 Supplement Responses to Comments, Page 13. Available in the public docket and at [https://www.epa.gov/sites/production/files/2016-11/documents/rtc\\_so2\\_comments\\_received\\_document\\_4\\_tx\\_sources\\_final\\_0.pdf](https://www.epa.gov/sites/production/files/2016-11/documents/rtc_so2_comments_received_document_4_tx_sources_final_0.pdf).

conflicting monitoring, where appropriate, has been judicially affirmed. *See, e.g., Montana Sulphur & Chemical Company v. EPA*, 666 F.3d 1174, 1185 (9th Cir. 2012).

In the Round 2 Supplement for these three areas, the EPA considered Texas's recommendations but appropriately modified the recommendations, per CAA section 107(d)(1)(B)(2), because they were not supported by currently available information. Specifically, the EPA's assessment of Sierra Club's modeling was that currently available information showed violations of the 2010 SO<sub>2</sub> NAAQS. At the time of the EPA's final nonattainment designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County, although Texas preferred that the EPA designate the areas based on proposed future monitoring data rather than on existing submitted modeling, there were no representative monitoring data<sup>10</sup> or other reliable modeling demonstrations available to refute Sierra Club's information demonstrating violations of the 2010 SO<sub>2</sub> NAAQS, as explained in the EPA's final designations TSD.<sup>11</sup> The absence of available monitoring data at that time did not relieve the EPA of its obligation to issue designations for these areas by the court-ordered deadline. Furthermore, at the time of the final designations, the Agency did not have the discretion to await the results of 3 years of ambient air monitoring data (*i.e.*, 2018-2020) from Texas's proposed (but not yet established) monitoring sites before taking final action due to the court's order to designate certain areas in Texas. There was, however, as explained previously and in the EPA's final designations TSD, valid modeling submitted by the Sierra Club based on the then-most recent actual emissions demonstrating that the areas were violating the 2010 SO<sub>2</sub>

---

<sup>10</sup> As explained in the EPA's intended and final designations TSDs and the responses to comments document that accompanied the Round 2 Supplement, at the time of the EPA's final designations on December 13, 2016, there were no SO<sub>2</sub> monitors sited in the areas of maximum concentration to properly characterize the air quality around the Martin Lake, Big Brown, or Monticello areas, nor were there SO<sub>2</sub> monitors in the same counties as the facilities.

<sup>11</sup> The EPA received a comment from the Utility Air Regulatory Group on the Round 2 Supplement suggesting that the EPA wait for the future completion of three years of monitoring before designating certain Round 2 areas. In the Round 2 Supplement Responses to Comments (page 14), the EPA responded that the Agency does not have the discretion to await the results of future monitoring because of the court order to designate certain areas by the July 2, 2016, deadline.



NAAQS. As explained earlier, the EPA no longer believes there were errors in our Round 2 Supplement’s analysis that Sierra Club submitted valid, representative modeling (based on the then-most recent actual SO<sub>2</sub> emissions) that demonstrated that the areas were violating the 2010 SO<sub>2</sub> NAAQS, or that further refining the modeling would result in modeled values near or below the standard. Therefore, even though the EPA considered Texas’s preference for monitoring, given that the statute requires that the EPA consider available information, Texas’s preference for reliance on monitoring information when there were no such monitoring data available at the time of the EPA’s final designations in December 2016 did not and could not rebut Sierra Club’s modeling showing violations of the 2010 SO<sub>2</sub> NAAQS.<sup>12</sup>

### **III. Purpose of this Action**

In the 2019 Proposed Error Correction, the EPA proposed that our relying on the Sierra Club modeling *along with* our not giving greater weight to Texas’ preference for monitoring, represented an insufficient basis for the EPA’s initial nonattainment designations. For the reasons discussed previously, the EPA no longer believes it has a basis under these reasons individually or collectively to propose to or conclude that we made errors in our nonattainment designations of these areas, and, therefore, no longer believes that we have a basis to conclude that the EPA could not determine, based on available information at the time of issuing the designation, whether the three Texas areas that are the subject of this proposed action were meeting or not meeting the 2010 SO<sub>2</sub> NAAQS (*i.e.*, the conclusion necessary to correct the designations to unclassifiable). Therefore, the EPA is withdrawing the Proposed Error Correction.

### **IV. Statutory and Executive Order Reviews**

This withdrawal of a proposed rule does not establish new regulatory requirements. Hence, the requirements of other regulatory statutes and Executive Orders that generally apply to rulemakings (*e.g.*, the Regulatory Flexibility Act) do not apply to this action.

---

<sup>12</sup> See *State of Texas v. EPA*, 983 F.3d 826, 836-838 (5th Cir. 2020).

## **List of Subjects in 40 CFR Part 81**

Environmental protection, Air pollution control, Sulfur dioxide.

---

**Michael S. Regan,**  
Administrator.

[FR Doc. 2021-13696 Filed: 6/28/2021 8:45 am; Publication Date: 6/29/2021]